IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-146

STEPHEN T. BURNS, et al.,
Petitioners,

v.

CITY OF DES PERES, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13-28)[1] is reported at 533 F.2d 103. The opinion of the district court containing its findings of fact and conclusions of law, entered June 3, 1975, is printed in an appendix to this Brief in Opposition and is not reported.

[1] "Pet. App." refers to the Appendix contained in the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered April 14, 1976, and the mandate of the court was issued on May 5, 1976. The petition for a writ of certiorari was received by respondents on July 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 42 U.S.C. 1984.

QUESTION PRESENTED

I

Did the District Court have jurisdiction to grant defendants' Motion for Judgment Notwithstanding the Verdict and set aside the jury verdict aginst three (3) of the defendants?

II

Was the plaintiffs' evidence pertaining to discrimination and bad faith on the part of the defendants sufficient to support the jury's verdict?

III

Were the 1973 settlement negotiations of the respondents subject to the exclusionary principles of the rules of evidence?

STATEMENT OF THE CASE

Plaintiffs filed this civil rights action in October, 1973 pursuant to 42 U.S.C. 1983 and the 14th Amendment to the Constitution against the City of Des Peres, Missouri and twenty-three (23) individual defendants who were present or former

elected or appointed officials of the City. The complaint alleged that defendants denied plaintiffs due process and equal protection of the law because of defendants' failure to rezone the plaintiff's property. Plaintiffs sought $1,135,000 in compensatory and punitive damages. The City of Des Peres and five (5) individual defendants were dismissed from the action pursuant to pretrial motions for dismissal or summary judgment. In addition, a conspiracy claim and a second count dealing with alleged unfair housing practices were eliminated by the District Court.

The jury returned a verdict against three (3) of the defendants for $6,000. However, the District Court set aside the verdict, granting the three (3) defendants' Motion for Judgment Notwithstanding the Verdict, finding no evidentiary basis for the verdict. Plaintiffs appealed to the Eighth Circuit Court of Appeals and that court affirmed the District Court's Order in all respects.

ARGUMENT

1. Plaintiffs first question the jurisdiction of the District Court to give judgment for the defendants and set aside the jury verdict. It is rather curious that in their discussion of the District Court's power to set aside a jury verdict, plaintiffs do not ever mention Rule 50(b) of the Federal Rules of Civil Procedure which specifically gives the District Court such power. Rule 50(b) was adopted following the confusion created by three cases decided by this Court: *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913), the case cited by plaintiffs for the proposition that the District Court's action and its affirmance by the Eighth Circuit Court of Appeals, was a violation of the Seventh Amendment; and the cases of *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), and *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937), *Johnson v. New York, New Haven and Hartford Railroad Co.*, 344 U.S. 48, 51 (1952).

Plaintiffs also question the propriety of the District Court and the Eighth Circuit reviewing the evidence in making a determination on defendants Motion for Judgment Notwithstanding the Verdict. However, this Court has consistently refused to grant certiorari in cases dealing with motions under Rule 50(b) where the lower court has used a standard specifically calling for review of the evidence. *Olympic Ins. Co. v. H. D. Harrison, Inc.*, 463 F. 2d 1049 (5th Cir. 1972), *Cert. denied*, 410 U.S. 930 (1973); *First National Bank of Lubbock v. U.S.*, 463 F. 2d 716 (5th Cir. 1972), *Cert. denied*, 409 U.S. 1125 (1973); *Champion Oil Service Co. v. Sinclair Refining Co.*, 502 F. 2d 709 (6th Cir. 1974), *Cert. denied*, 420 U.S. 930 (1975), *Rehearing denied*, 421 U.S. 922 (1975).

2. The second question which plaintiffs raise is whether their "evidence pertaining to discrimination and bad faith on the part of the defendants is sufficient to support the jury's verdict." Plaintiffs do not argue this point, so defendants will only go so far as

to say that the District Court reserved its ruling on defendants' Motion for Directed Verdict and following the trial reviewed the evidence and found no evidence to support a verdict. (see Appendix, post) Following the appeal by plaintiffs, the Court of Appeals reviewed the evidence and found that the District Court was correct in its finding that there was no evidence to support a verdict. Again, plaintiffs point to no specific error in either of the above rulings.

3. Petitioner Burns attempted to introduce statements by members of the Des Peres Board of Aldermen during settlement negotiations that occurred between January 17, 1973 and May 29, 1973. These negotiations were conducted in an attempt to settle the suit Petitioner had filed in the Circuit Court of St. Louis County. They were not entered into as a result of the suit herein. This fact is important in determining the purpose for which Petitioner sought to introduce this evidence in the Federal District Court. Secondly, these negotiations continued until May 29, 1973 largely because the Circuit Court of St. Louis County ordered on March 30, 1973 that the parties should attempt to reach an agreement. This fact relates to the issue whether the Board of Aldermen had the authority to enter into negotiations and reach an agreement with Petitioner concerning the use of his property.

Petitioner has never denied that the true purpose in seeking to admit this evidence was to show that certain members of the Board acted in bad faith. The statements made by the Board of Aldermen were made during negotiations in an attempt to reach a settlement in the state court suit concerning the zoning use of Petitioner's property. The whole basis of Petitioner's suit in the federal court was that he was denied his constitutional rights in a purposeful manner. The law is clear that statements made during settlement negotiations are not admissable by the plaintiff to establish liability of the defendant(s). *Agrashell, Inc. v. Hammons Products Co.*, 479 F.2d 269, 288 (8th Cir.), *Cert.*

denied, 414 U.S. 1022, 1032 (1973); *Greyhound Lines v. Miller*, 402 F.2d 134, 139 (8th Cir. 1968); *Overseas Motors, Inc. v. Import Motors Limited, Inc.*, 375 F. Supp. 499 (E.D. Mich. 1974).

Petitioner argues that it was beyond the authority of the City of Des Peres to "settle" Petitioner's zoning claim in the Circuit Court, and therefore since there could be no settlement agreement, there were no settlement negotiations. Petitioner has not cited a case to substantiate this view. The amended plat submitted by Petitioner Burns was the subject of the settlement negotiations. There is, however, a significant limitation on a municipality's authority to settle zoning disputes: it may not contract away its police power by entering into contracts with private parties which are contrary to the zoning laws of the City. Contracts of private interest are forbidden because such contracts abrogate the police power. *Northern Pacific Railway v. Duluth*, 208 U.S. 583, 597-598 (1908). In the cause herein it was within the Board of Aldermen's lawfully delegated administrative discretion to determine if Petitioner's amended plat was in the interest of public health, welfare and safety. The Board of Aldermen rejected a settlement based upon the amended plat. Had it accepted the plat and reached an agreement, no abrogation of its police powers would have occurred since it would have been a "contract" in the public interest pursuant to the lawful zoning ordinances of Des Peres and usual rezoning procedures would have been necessary. The Board of Aldermen also followed standard procedures in determining whether the revised plat was in the best interests of the inhabitants of Des Peres. The statements by members of the Board were made during valid and lawful settlement negotiations and their exclusion by the District Court was proper. Zoning matters are constantly subject to negotiation. As long as such negotiations are subject to public scrutiny by virtue of public hearings, and as long as it is in furtherance of the public welfare and within the framework of the comprehensive zoning

plan, such negotiations are to be encouraged to maintain flexible zoning and reduce litigation. The admission of statements made during such negotiations are not only contrary to public policy, but it also has a chilling effect on proper zoning regulations.

CONCLUSION

Rule 50(b) of the Federal Rules of Civil Procedure permits United States District Courts to set aside a jury verdict pursuant to a motion for judgment notwithstanding the verdict. The Supreme Court has consistently refused to grant certiorari in such cases. Furthermore, plaintiffs have not argued that any specific error was made by the District Court and Court of Appeals in making their findings based upon the evidence presented. The only specific error alleged by plaintiff is that certain evidence from settlement negotiations should have been permitted by the District Court. Defendants believe this argument is devoid of merit because these negotiations were within the Board of Aldermen's authority and were ordered by the Circuit Court of St. Louis County, Missouri. These negotiations should be protected to encourage settlements of zoning disputes.

Respectfully submitted

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APPENDIX

APPENDIX

United States District Court
Eastern District of Missouri
Eastern Division

Stephen T. Burns and Edna Burns, Plaintiffs,
vs.
Shirley M. Sweet, et al., Defendants.
No. 73 C 703 (1).

Order

(Filed June 3, 1975)

Plaintiffs are the owners of certain lots in Des Peres, Missouri. Defendants were members of the Board of Aldermen. Plaintiffs alleged the action arose under the Civil Rights Act, 42 U.S.C. 1983 and 1985, 18 U.S.C. 242, and the Fourth and Fourteenth Amendments to the Constitution.

The cause was tried to a jury which rendered a judgment against Steve Tapper, Edward Smith, and Scott H. Styles in the sum of $6,000.00. The defendants have moved to set aside the judgment or for the Court to act on the motion to direct a verdict prior to submission to the jury or in the alternative for a new trial. Plaintiffs have moved for a new trial and to amend the judgment.

The background of this litigation is that in 1967 plaintiffs were in a district "A" zone, which was single family zoning requiring lots of one acre (43,000 sq. ft. or more). Plaintiffs requested the city to re-zone from "A" to "B". "B" zoning is

single family zoning requiring lots of 17,500 sq. ft. or more, which would allow eight lots to be made from the Burns property, as opposed to four lots under "A" zoning. The City Planning and Zoning Board approved plaintiffs' request. The Board of Aldermen by unanimous vote did not approve the re-zoning. The three defendants in question against whom the jury rendered judgment voted against the re-zoning.

The evidence before this Court failed to show that any of these defendants against whom judgment was rendered, or the other defendants in whose favor the jury found, had ever granted a change from "A" zoning to "B" zoning in the area in question. There was no evidence adduced that the defendants acted arbitrarily, capriciously, or oppressively. In fact, there was no evidence to sustain a verdict against the three defendants in question. Accordingly,

It Is Hereby Ordered that the judgment against the defendants be and the same is set aside and judgment is rendered in favor of the defendants and against the plaintiffs. Costs are assessed against the plaintiffs.

It Is Further Ordered that all other motions are denied.

Dated this 3rd day of June, 1975.

/s/ JAMES H. MEREDITH
United States District Judge